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No. 98-492

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

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BEVERLY HEALTH AND REHABILITATION SERVICES, INC., *et al.*,
*Petitioner,*

v.

GERALD KOBELL, Regional Director for Region Six of the National Labor Relations Board for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF *AMICI CURIAE* OF LPA AND THE AMERICAN TRUCKING ASSOCIATION, INC. IN SUPPORT OF PETITIONER

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## BRIEF *AMICI CURIAE* OF LPA AND THE AMERICAN TRUCKING ASSOCIATION, INC. IN SUPPORT OF PETITIONER

LPA and the American Trucking Association, Inc. (ATA) respectfully submit this brief *amici curiae* with the consent of all parties.[1] The brief supports the petition for writ of certiorari.

### INTEREST OF THE *AMICI CURIAE*

LPA is an organization of the senior human resources officers of over 250 of the nation's largest private sector

[1] Counsel for *amici curiae* LPA and ATA authored this brief in its entirety. No person or entity other than LPA and ATA made a monetary contribution to the preparation of the brief.

employers, collectively employing more than 12 million Americans. Since its founding in 1939, LPA has been concerned exclusively with the development of laws and policies relating to employment. LPA's mission is to ensure that laws and policies affecting labor relations are sound, practical, and responsive to the realities of the modern workplace.

ATA, a not-for-profit corporation, is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. ATA membership includes more than 3,700 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents over 34,000 companies and every type and class of motor carrier in the United States.

All of LPA's and ATA's members are employers subject to the National Labor Relations Act (NLRA or the Act), 29 U.S.C. §§ 151 *et seq.*, and therefore subject to the injunction provisions at 29 U.S.C. § 160(j) (Section 10(j)). Proceedings under this section, which empowers federal courts to issue temporary injunctions against employers, often can result in court-ordered personnel and management decisions that cost a company time, money, and public good will *without a full adjudication of the facts and circumstances surrounding the case.* As such, LPA and ATA are especially concerned about the legal standards under which such injunctions are issued.

Because of their interest in the development of the nation's labor laws, LPA and ATA have participated as *amicus curiae* on many labor law issues in cases before this Court, the United States Courts of Appeals, and the NLRB.[2] Thus, LPA and ATA have an interest in, and

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[2] *E.g., Webcor Packaging, Inc. v. NLRB, cert. denied,* 118 S. Ct. 1035 (1998); *Chemical Waste Mgmt. v. Hunt,* 504 U.S. 334 (1992); *Albertson's, Inc. v. Hallie Kirkingburg,* No. 98-591 (U.S.) (decision pending); *Electromation v. NLRB,* 35 F.3d 1148 (7th Cir. 1994).

familiarity with, one of the major issues presented in this case: the standard under which courts issue injunctions under Section 10(j).

## STATEMENT OF THE CASE

The facts of the case are set out fully by Petitioner.

## SUMMARY OF REASONS FOR GRANTING THE WRIT

The Third Circuit's two-pronged test for issuing injunctions under Section 10(j) of the NLRA is fundamentally contrary to well-established equitable principles and Supreme Court precedent and should be reviewed by the Court.

It is well settled that the appropriateness of preliminary injunctive relief is controlled by a comprehensive balancing of well-defined equitable principles. Every federal court of appeals, including the Third Circuit, has adopted a test that weighs four factors—the likelihood of success on the merits, the extent of harm that would result from denying the requested relief, the extent of harm that would result from granting the relief, and the public interest.

Although this Court has never ruled on the appropriate standard for 10(j) relief, the Court has authoritatively decided that the full scope of equitable factors should be considered when courts are asked to exercise equitable powers under a statute, unless the statute clearly limits or modifies the relevant considerations. The NLRA provides no such limits.

Despite clear guidance from this Court, the Third Circuit has completely abandoned traditional equitable principles in 10(j) cases in favor of a *de minimus* two-prong test. This test, which in no way reflects the traditional inquiry, requires merely that the Board demonstrate that (1) there is "reasonable cause" to believe that an unfair labor practice has occurred; and (2) the relief sought is "just and proper."

As this Court previously has recognized, the power of the federal courts to grant or withhold equitable relief under a federal statute is an important question deserving review by the Court. This proposition is especially true, however, with respect to 10(j) relief, which is exercised without the benefit of a full adjudication of the facts, involves large-scale, high-cost consequences, and implicates the interests of third parties not associated with the proceedings. Moreover, review of the issue is especially important at this time, in light of the Board's recent aggressive use of 10(j) injunctions and dismal success rate in the courts of appeals.

## REASONS FOR GRANTING THE WRIT

### I. THE THIRD CIRCUIT'S TEST FOR ISSUING 10(j) INJUNCTIONS IS FUNDAMENTALLY CONTRARY TO WELL-ESTABLISHED EQUITABLE PRINCIPLES AND SUPREME COURT PRECEDENT AND SHOULD BE REVIEWED BY THE COURT

#### A. The Appropriateness of Preliminary Injunctive Relief—Such as That Authorized by Section 10(j) of the NLRA—Is Controlled by a Comprehensive Balancing of Well-Established Equitable Principles

It is well settled that the appropriateness of preliminary injunctive relief is controlled by a comprehensive balancing of well-defined equitable principles. In determining whether preliminary injunctive relief is warranted, every federal court of appeals has adopted a test that in some form or another weighs the following factors:

(1) the likelihood of success on the merits;

(2) the likelihood and extent of harm that would result if the injunction was not issued;

(3) the likelihood and extent of harm that would result from granting the injunction; and

(4) the public interest in issuing the injunction.[3]

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[3] *EEOC v. Astra USA*, 94 F.3d 738 (1st Cir. 1996); *International Bhd. of Teamsters v. Local Union No. 810*, 19 F.3d 786 (2d Cir.

Even the Third Circuit, which refused to apply the test here, has categorically and unequivocally stated that:

> This Court has consistently identified four factors which must be examined in ascertaining the propriety of a preliminary injunction: . . . the moving party must generally show (1) a reasonable probability of eventual success in the litigation and (2) that the movant will be irreparably injured *pendente lite* if relief is not granted. . . . Moreover, . . . the district court "should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest." . . . While these factors structure the inquiry, however, no one aspect will necessarily determine its outcome. Rather, proper judgment entails a "delicate balancing" of all elements

*Eli Lilly & Co.*, 630 F.2d at 136 (citations omitted).

Because preliminary injunctive relief requires an adjustment of the rights of the parties *without a full adjudication of the facts*, federal courts consistently and uniformly have considered *all* the relevant factors carefully before granting or denying such relief. As the Third Circuit indicates, no single factor is dispositive or dispensable.

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1994); *Eli Lilly & Co. v. Premo Pharm. Labs. Inc.*, 630 F.2d 120 (3d Cir.), *cert. denied*, 449 U.S. 1014 (1980); *Virginia Carolina Tools, Inc. v. International Tool Supply, Inc.*, 984 F.2d 113 (4th Cir.), *cert. denied*, 508 U.S. 960 (1993); *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545 (5th Cir. 1993); *Dayton Area Visually Impaired Persons v. Fisher*, 70 F.3d 1474 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1421 (1996); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446 (7th Cir. 1995); *Hill v. Xyquad, Inc.*, 939 F.2d 627 (8th Cir. 1991); *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427 (9th Cir. 1995); *Walmer v. United States DOD*, 52 F.3d 851 (10th Cir.), *cert. denied*, 516 U.S. 474 (1995); *Gold Coast Pubs. v. Corrigan*, 42 F.3d 1336 (11th Cir. 1994), *cert. denied*, 516 U.S. 337 (1995); *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738 (D.C. Cir. 1975); *Bio-Tech. Gen. Corp. v. Genentech, Inc.*, 80 F.3d 1553 (Fed. Cir.), *cert. denied*, 519 U.S. 911 (1996).

Moreover, that all thirteen circuits have arrived at substantially the same test is no coincidence. "We are dealing here with the requirements of equity practice with a background of several hundred years of history." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The equitable practices established by the federal courts have been tried, tested, and refined through iteration upon iteration. As this Court has noted, "[w]e do not think that . . . a major departure from that long tradition should be lightly implied." *Id.* at 330.

### B. This Court Has Authoritatively Decided That Traditional Equitable Principles Apply to Injunctive Relief Under a Federal Statute Unless the Statute Itself Limits the Applicability of Such Factors

This Court has authoritatively decided that, in exercising their equitable jurisdiction, federal courts should apply traditional equitable considerations and powers to tailor relief to the particular facts of the case, unless the statute under which the equitable juirsdiction is conferred clearly limits or modifies those factors.

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and compete exercise of that [equitable] jurisdiction.
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> * * * *
>
> Power is thereby resident in the District Court in exercising this jurisdiction, "to do equity and mould each decree to the necessities of the particular case."
>
> * * * *
>
> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command.

*Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (citations omitted). *See also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982); *Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas R. Co.*, 363

U.S. 528, 532 (1960). "The great principle of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction. . . . Only in that way can equity do complete rather than truncated justice." *Porter*, 328 U.S. at 398.

Thus, it is well-settled that unless the statute clearly indicates otherwise, courts must thoroughly examine the full scope of equitable considerations when asked to exercise equitable power such as preliminary injunctive relief.

**C. Section 10(j) of the NLRA Does Not Limit the Application of Traditional, Well-Established Equitable Principles, but Rather Endorses Their Use**

Section 10(j) of the NLRA provides:

> The Board shall have the power, upon issuance of a complaint . . . to petition any United States district court . . . for appropriate temporary relief or restraining order. Upon the filing of any such petition, the Court . . . shall have jurisdiction to grant the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. § 160(j).

Consistent with the language of this section, four circuits—the First, Second, Seventh, and Ninth—have interpreted this provision essentially as a grant of *jurisdiction* to the federal courts to hear and decide appropriate cases *using traditional equitable rules and principles. Pye v. Sullivan Bros. Printers*, 38 F.3d 58 (1st Cir. 1994); *Kaynard v. Mego Corp.*, 633 F.2d 1026 (2d Cir. 1980); *Kinney v. Pioneer Press*, 881 F.2d 485 (7th Cir. 1989); *Miller v. California Med. Ctr.*, 19 F.3d 449 (9th Cir. 1994).[4]

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[4] The District Court for the District of Columbia also has applied the traditional test, *D'Amico v. U.S. Serv. Indus., Inc.*, 867 F. Supp. 1075 (D.D.C. 1994), as has the most recent district court decision from the Fourth Circuit. *D'Amico v. Townsend Culinary, Inc.*, 159 L.R.R.M. (BNA) 2455 (D. Md. 1998). The District of Columbia

These circuits all have applied the traditional four-factor test to determine whether preliminary injunctive relief is appropriate. These courts, in conformity with this Court's doctrine, have applied the full scope of equitable factors to 10(j) cases because the statute does not indicate that consideration of such factors should be limited. Indeed, relying on this principle, both the Seventh and Ninth Circiuts overruled prior deicsions that did not reflect the traditional inquiry. *Kinney,* 881 F.2d at 491; *Miller,* 19 F.3d at 457.

The reasoning of these decisions clearly estabilsh that the NLRA places no limits on the use of traditional equitable factors in determining the appropriateness of 10(j) relief. At the petition stage, an in depth discussion of the merits of this issue is somewhat premature. Nevertheless, to resolve this question one need consider nothing more than the last clause of Section 10(j)—that "the Court . . . shall have jurisdiction to grant the Board such . . . relief . . . *as it deems* just and proper." 29 U.S.C. § 160(j). As one can see, Congress did not intend to limit the court's equitable discretion, but rather, explicitly dedicated the issue to the court's discretion. As such, Section 10(j) can only be construed as an *endorsement* of the traditional principles.[5]

Because the statute does not limit the applicability of traditional equitable factors in the 10(j) context, those

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and Fourth Circuits, however, have not definitively ruled on the issue. *See U.S. Serv. Indus.*, 867 F. Supp. at 1082; *Townsend Culinary*, 159 L.R.R.M. at 2459.

[5] Section 10(j) was added to the NLRA in 1947 by the Taft-Hartley Act, Pub. L. No. 80-101, c. 120, Title I § 101, 61 Stat. 136, 146, just one year after this Court's decision in *Porter*. As this Court has recognized, where subsequent laws have been enacted, there is a "presumption that Congress was aware of [prior] judicial interpretations and, in effect, adopted them." *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2286 (1998). In light of *Porter*, it defies credulity to conclude that Congress intended to limit the applicability of the traditional factors by the Section 10(j) language.

factors must be considered by the district courts in determining the appropriateness of 10(j) relief.

### D. The Third Circuit Has Completely Abandoned the Traditional, Well-Established Principles Governing the Appropriateness of Injunctions in Cases Arising Under Section 10(j)

Despite its forceful endorsement of using traditional equitable principles to "ascertain[] the propriety of preliminary injunction[s]" in other contexts, *Eli Lilly*, 630 F.2d at 136, the Third Circuit has completely abandoned those principles in 10(j) cases.

Instead, the Third Circuit has adopted a two-prong test requiring the Board to demonstrate merely that (1) there is reasonable cause to believe that an unfair labor practice has occurred and (2) that the relief sought is just and proper. *Kobell v. Suburban Lines*, 731 F.2d 1076, 1078 (3d Cir. 1984).[6] This two-part inquiry in no way mirrors the thorough analysis required by the traditional four-factor test.

To meet the "reasonable cause" prong of the Third Circuit test, the Board need only satisfy two *de minimus* requirements.

> First, there must be a *substantial, non-frivolous, legal theory,* implicit or explicit, in the Board's argument, and second, *taking the facts favorably to the Board,* there must be sufficient evidence to support that theory.

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[6] The Fifth, Sixth, Tenth, and Eleventh Circuits have adopted approaches similar to that of the Third Circuit. *See Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1189-93 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976); *Gottried v. Frankel*, 818 F.2d 485, 495 (6th Cir. 1987); *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967); *Dowd v. International Longshorman's Ass'n*, 975 F.2d 779 (11th Cir. 1992). We believe that the split between these courts, and the First, Second, Seventh, and Ninth Circuits, by itself warrants review by this Court. Petitioner, however, has thoroughly briefed this point, (Pet'n at 6-13), and we need not repeat those arguments here.

*Pascarell v. Vibra Screw, Inc.*, 904 F.2d 874, 882 (3d Cir. 1990). The Third Circuit itself confesses that under this test, "the burden of proof faced by the [NLRB] is 'relatively insubstantial.'" *Suburban Lines*, 731 F.2d at 1084.

The second prong of the Third Circuit test requires that the Board establish that the injunctive relief is "just and proper." Although the Third Circuit has been less than clear in defining this phrase, the essence of the inquiry is whether a failure to grant 10(j) relief "would prevent the Board . . . from effectively exercising ultimate remedial powers." *Suburban Lines*, 731 F.2d at 1091-92. In any event, whatever meaning is attributed to "just and proper," it is clear that in the Third Circuit it does not incorporate traditional principles, as "interim injunctive relief may be granted under section 10(j) without the showing of irreparable harm and a likelihood of success on the merits, which are the ordinary requisites for a preliminary injunction." *Id.* at 1078.

Because the Third Circuit, in 10(j) cases, has completely abandoned traditional, well-established equitable principles in contravention of the clear guidance from this Court, the Court should review the ruling below in this case.

## II. THE PROPER STANDARD FOR ISSUING 10(j) RELIEF IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT

As this Court previously has recognized, the "power of the federal courts to grant or withhold equitable relief for violations" of federal statutes is "an important question" deserving review by this Court. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1992). For the reasons stated below, this proposition is *especially* true regarding 10(j) injunctions.

### A. 10(j) Relief Is Preliminary in Nature and Necessarily Issued Prior to a Full Adjudication of the Case

This Court has recognized that, in order to "secur[e] complete justice," *Porter*, 328 U.S. at 1089, courts must examine the full array of equitable factors before exercising *any* equitable powers. This proposition is especially valid with respect to preliminary injunctive relief, such as that authorized by Section 10(j).

This is because preliminary relief is exercised without the benefit of a full adjudication of the facts of the case. As such, "the award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even where irreparable injury might otherwise result . . ." *Yakus v. United States*, 321 U.S. 414, 440 (1944). Rather, in order to ensure that injustice is not done in the early stages of litigation, courts consistently have required at least some showing on the likelihood of success on the merits. Even the Third Circuit has stated:

> The furthest we have gone in easing this standard is our statement that "where factors of irreparable harm, interests of third parties and public considerations strongly favor the moving party, an injunction might be appropriate 'even though plaintiffs did not demonstrate *as strong* a likelihood of ultimate success as would generally be required." However, we have never gone so far as to depart from our established standard that a moving party must show a "reasonable probability of eventual success in the litigation."

*In Re Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137, 1147 (3d Cir. 1982) (emphasis in original; citations omitted).

Like all preliminary relief, the 10(j) injunction is "an extraordinary tool because it injects the legal system into disputes before a full airing of the facts and a careful consideration of the law, and mistakes can be costly."

*Kinney v. International Union of Operating Eng'rs Local 150,* 994 F.2d 1271, 1277 (7th Cir. 1993). Thus, consideration of all the traditional factors—including probability of success on the merits—is no less important in 10(j) cases than in other contexts. On the contrary, as the First Circuit explains, because in 10(j) cases "the interim relief sought by the Board is essentially the final relief sought, the likelihood of success should be strong." *Asseo v. Pan Am. Grain Co.,* 805 F.2d 23, 29 (1st Cir. 1986).

Finally, we note that the danger inherent in the Third Circuit's approach is not limited to its failure to recognize the interlocutory nature of 10(j) relief. Rather, this danger is compounded because the Third Circuit treats the facts as *fully adjudicated*—accepting them as alleged by the Board.

Thus, although the proper exercise of any equitable power presents an important question of law, because 10(j) relief *always* requires an exercise of that power before a resolution on the merits, the proper standard for 10(j) relief is especially important.

### B. The Unfair Labor Practice Complaint Is Just the First Step in an Adjudicative Process That Involves Many Stages and Levels

The unfair labor practice complaint, upon which 10(j) proceedings are based, is merely the first step in an adjudicative process that involves many stages including hearing and recommendation by an administrative law judge (ALJ), review and decision by the NLRB, and judicial review by the courts of appeals. At any of these stages of the process, the General Counsel's view of the facts and the law may be, and often is, rejected. It is not uncommon for an ALJ to rule against the General Counsel because of a different view of the facts, the law, or both. *E.g., Fresh Mark, Inc., d/b/a Carriage Hill Foods,* JD-82-98 (June 8, 1998); *Micrometl Corp.,* JD-101-98 (June

19, 1998). Similarly, it is not uncommon for the Board to overturn an ALJ decision that found in favor of the General Counsel. *E.g., Diva Ltd.*, 325 N.L.R.B. No. 152 (May 22, 1998); *White Cap, Inc.*, 325 N.L.R.B. No. 220 (July 24, 1998). Furthermore, as discussed *infra* section II.E., NLRB rulings often are reversed by a reviewing court.

As one can easily see, Congress clearly recognized that there often may be a great disconnect between prosecutorial perception [7] and factual (or legal) reality, and there are numerous cases that concretely illustrate this point.

For example, in *Clark v. Fieldcrest Cannon, Inc.*, 1994 U.S. Dist. LEXIS 20979 at *5 (M.D.N.C. Aug. 25, 1994), the Board sought 10(j) relief to reinstate workers *allegedly* fired for union activity. After a full ALJ hearing, review by the Board, and subsequent review by the Fourth Circuit, however, it ultimately was determined that three of the workers for which 10(j) relief was sought actually were terminated for various forms of misconduct. One worker was terminated for reporting to work drunk on several occasions; another for behavior that "ranged from murderous threats to sexual harassment;" and the third for "cheating on production." [8] *Fieldcrest Cannon v. NLRB*, 97 F.3d 65, 73-74 (4th Cir. 1996).

Similarly, in *Pye v. Jordan Marsh Stores Corp.*, 94-11509EFH (D. Mass. July 29, 1994), the Board again sought 10(j) relief to reinstate an "unlawfully" fired sales-

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[7] Although the NLRB General Counsel must obtain authorization from the Board before seeking 10(j) relief, statistics indicate that such authorization is largely a formality. Since 1980, when statistics first became available, the Board has authorized 10(j) proceedings in 9 of 10 requests. Fred Feinstein, Acting General Counsel, NLRB, Report on Utilization of § 10(j) Injunction Proceedings March 3, 1994 through March 2, 1998 2, n.3 (July 23, 1998).

[8] This worker operated her towel machine "without towels in it, thereby increasing her production and pay."

person. After an ALJ hearing and review by the Board, however, it was determined that the company fired the worker for stealing the commission of an employee on sick leave. *Jordan Marsh Stores Corp.*, 317 N.L.R.B. 460, 471-76 (1955). It is worth noting that this case was decided in a circuit that applies the traditional test. It is not unreasonable to speculate that, in the Third Circuit, 10(j) relief may have been granted.

We also note that at least in these examples—where the Board's case simply turned out to be factually wrong—the complaints at issue were based on indisputable interpretations of the law. However, the General Counsel often issues complaints where the law is unsettled, or where the General Counsel believes the Board may be inclined to overturn precedent. *See, e.g.*, NLRB General Counsel's Report, Oct. 1, 1995, Through March 31, 1996, *reprinted in* Daily Lab. Rep. (BNA) No. 226 E-1, E-4-5 (Nov. 22, 1996) ("We concluded that, after contract expiration, a provision for dues checkoff, like any other mandatory term and condition of employment, remains subject to bargaining before it can be changed. Case law to the contrary was deemed distinguishable or wrongly decided.")

Thus, although the issuance of a complaint is a prerequisite for 10(j) relief, this factor was never intended by Congress to be controlling regarding the appropriateness of such relief. The Third Circuit's approach, which takes such complaints at face value with respect to both fact and law, shows no cognizance of this important consideration.

### C. 10(j) Injunctions Often Involve Large-Scale, High-Cost Consequences

The proper standard for 10(j) relief also takes on added importance because such cases often implicate large-scale, high cost personnel and management actions. For example, an injunction recently sought by the Board

in Michigan would have required that the company spend more than $6 million to restore certain operations that had been subcontracted out, even though the company had lost $16 million on those operations during the previous 18 months and 97 percent of the subcontracted work went to unionized firms. *Calatrello v. Automatic Sprinkler Corp. of Am.*, 55 F.3d 208 (6th Cir. 1995).

A similar case, filed by the Board in California, sought to enjoin the company from closing a facility before a union representation election, even though that operation had lost millions of dollars and had been put on "probation" by the company before any union activity had begun. *Miller v. LCF, Inc.*, 147 L.R.R.M. (BNA) 2911 (N.D. Cal. 1994). Again, it is worth noting that the employer was ultimately vindicated on the merits and the relief sought by the General Counsel was denied. *LCF, Inc. v. NLRB*, 129 F.3d 1276 (D.C. Cir. 1997).

As these examples demonstrate, 10(j) injunctions—temporary though they may be—often involve large-scale, high-cost consequences. As a result, the appropriate standard for issuing such relief is an important question that warrants review by this Court.

### D. 10(j) Injunctions Often Implicate the Interests of Third Parties Not Asssociated With the Proceedings

It is also not uncommon for 10(j) relief to implicate the interests of third parties not associated with the 10(j) proceedings. As the case at bar illustrates, interested third parties often include workers who lose jobs to accommodate 10(j) reinstatement orders. Often, these reinstatement orders can affect hundreds of workers. And although 10(j) relief is "temporary" in nature, the effects of that relief on the displaced workers—such as lost income, expended savings, relocation, and other ancillary effects of lost employment—are nonetheless permanent. Moreover, one must remember that reinstatement, backpay, interest and other such "make whole" remedies are

not available to these third parties where Board allegations eventually are proven untrue.

The effects of 10(j) injunctions are not limited to displaced employees, however, and the relief sought by the Board often affects the interests of other parties as well. For example, in *Automatic Sprinkler,* discussed above, the relief sought by the NLRB directly affected the subcontractors who were threatened with the loss of lucrative contracts.

As this Court has stated, "it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all . . . whose interests the injunction may affect." *Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas R. Co.,* 363 U.S. 528, 532 (1960), *quoting Inland Steel Co. v. United States,* 306 U.S. 153, 157 (1939). In this regard, a court of equity may need to "act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest." *Porter,* 328 U.S. at 398.

Because 10(j) cases often involve the competing interests of parties not associated with the proceedings, the proper standard for granting such relief is an important question that deserves review by this Court.

### E. NLRB Decisions Have Been Particularly Unsuccessful in Federal Courts

Finally, we point out that approving Board legal theories and factual allegations as a matter of course in 10(j) cases, as the Third Circuit approach does, simply is not justified by the NLRB's recent track record in the federal courts.

According to the agency, in 1994, 37 percent of all Board decisions reviewed by the circuit's were reversed or remanded in whole or in part. *Hearing before the Subcomm. on Human Resources of the House Gov't Re-*

*form and Oversight Comm.*, 105th Cong., 1st Sess. (July 24, 1997) (statement of William B. Gould, IV, Chairman, NLRB, at 5), *reprinted in*, Daily Lab. Rep. (BNA) No. 143, at E-5, E-7 (July 25, 1997). In 1995, the Board fared even worse, getting reversed in whole or in part nearly 40 percent of the time. *Id.* In 1996 and 1997, the reversal rates were 34 and 30 percent, respectively. *Id.*; 62 NLRB Ann. Rep. 159, Table 19A (1997).

Furthermore, these Courts increasingly have accompanied the reversals with sharp criticism of the Board. For example, reviewing the Board's determination that tug boat captains were *not* supervisors, the Second Circuit refused to accept the NLRB's "warped interpretation of the facts," concluding:

> . . . the Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decisions in this area. . . . [T]he Board's manipulation of the definition of supervisor has reduced the deference that would otherwise be accorded its holdings.

*Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 488 (2d Cir. 1997). One year earlier, that same court scolded the Board in *Harpercollins San Francisco v. NLRB*, 79 F.3d 1324, 1332 (2d Cir. 1996), that:

> The NLRB may not, as it has here, totally disregard circumstances subsequent to the ULPs that weight against the imposition of a bargaining order. . . . Specifically, the NLRB has once again flouted the mandates of this circuit and has ignored our consistent holdings . . .

The D.C. Circuit, which reviews a large number of Board decisions, has been highly critical on numerous occasions.

> As a consequence of [the Board's] stubborn refusal to accept the holdings of virtually every circuit that has considered the matter, it has squandered a vast

> amount of our time as well as its own and has caused delays in the ultimate resolution of cases that cannot be laid at the feet of recalcitrant employers.

*Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1079 (D.C. Cir. 1996).

> [T]he Board's decision to issue a bargaining order in this case is so lacking evidentiary support and reasoned decisionmaking that it seems whimsical.

*Skyline Distribs. v. NLRB*, 99 F.3d 403, 410 (D.C. Cir. 1996). The Board's decision in *Skyline* was so lacking in legal merit that a concurring judge opined:

> We would not tolerate this kind of intransigence on the part of other litigants and I do not understand why the Board should receive special treatment.

*Id.* at 412 (Henderson, J., concurring).

Similarly, in *Lee Lumber Building Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997), the court observed:

> Case law in our circuit is as clear as it could be on this question. The Board, however, continues to ignore us. We continue to reverse.

A concurring judge in that case characterized the Board's position as "simply a way to tell this Circuit to go fly a kite." *Id.* at 1463 (Silberman, J. concurring).

Even the Third Circuit recently articulated similar exasperation with the Board:

> [I]t is especially unfortunate when the Board puts forth such a patchwork of adjudications without adequate rationalization, thereby abandoning potential litigants inside a maze of decisions with no means to map an exit. . . . [W]e do not question [the Board's] mandate. But, as we have noted, in fashioning a new rule, the Board's authority is not without boundaries. The Board may not, by *ipse dixit*, simply issue new rules (or "interpret" its old ones) without

> explaining the reason for their issuance (or reinterpretation) . . .

*Bro-Tech Corp. v. NLRB*, 105 F.3d 890, 896-97 (3d Cir. 1997).

Thus, even with the benefits of a full hearing on the facts, full briefings on the application of the law to the facts, and deferential standards of review, one in three Board decisions is found to be wrong and, in many cases, blatantly so. In light of these factors, the Third Circuit's conclusion that 10(j) relief should issue without regard to the merits of the case clearly should be examined by this Court.

### F. The NLRB Has Dramatically Increased Its Use of 10(j) Injunctions in Recent Years

For many years, it was well-recognized that 10(j) relief should be used "not as a broad sword, but as a scalpel, ever mindful of the dangers in conducting labor management relations by way of injunction." *McLeod v. General Electric Co.*, 366 F.2d 847, 849-50 (2d Cir. 1966) (quoting Frank McCulloch, Chairman, NLRB), *vacated on other grounds*, 385 U.S. 533 (1967). Nevertheless, in recent years, the NLRB has increased 10(j) use by 250 percent.

For example, during the 41 year period between 1953 and 1993, the Board instituted an average of 21 10(j) proceedings annually. NLRB Ann. Reps. (1953 through 1993). Since 1994, however, the Board has instituted an average of 73 such proceedings, more than tripling its four-decade average. Fred Feinstein, Acting General Counsel, NLRB, Report on Utilization of § 10(j) Injunction Proceedings March 3, 1994 through March 2, 1998 (July 23, 1998) (indicating that the NLRB brought 292 10(j) actions during this four year period).[9]

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[9] For further insight on the NLRB's increased use of 10(j) injunctions in recent years, *see* Herbert R. Northrup & H. Lane

We believe that the Board's recent aggressive use 10(j) proceedings further heightens the importance of the question presented to the Court in this case.

Despite the fact that Section 10(j) has been in place since 1947, this Court has not had an opportunity to address the proper standard for issuing 10(j) relief. For these fifty years, this question has posed a recurring and continuous problem for employers, regardless of the outcome of any particular case. This is because, in practical terms, the legal standard for 10(j) relief is omnipresent, and inapplicable only until the company's next business decision. This important question has escaped the Court's review for too long. The Court should resolve the issue in this case.

## CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the petition for writ of certiorari should be granted by the Court.

Respectfully submitted,

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Dennard, The Return of Government by Injunction? Public Policy and the Expansive Use of Section 10(j) of the NLRA, 22 Employee Rel. L.J. 101, 110 (Summer 1996).